IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

FRIDAY, THE 15TH DECEMBER 2006 / 24TH AGRAHAYANA 1928

CRP.No. 61 of 2006()

AGAINST THE ORDER IN IA 1110 of 2004 IN
OS.19/2002 of MUNSIFF COURT, ETTUMANOOR

.....

REVN. PETITIONER: PETITIONER/CR.PETITIONER-DEFENDANT

PHILIP, S/O.VARGHESE,
PADINJAROTHIL HOUSE, S.H.MOUNT.P.O,
NATTASSERI KARA, PERUMBAIKKADU VILLAGE,
KOTTAYAM TALUK & DIST.

BY ADV. SRI.MATHEW JOHN (K)
SRI.SUJESH MENON V.B.

RESPONDENTS: PETITIONER-PLAINTIFF

MATHEW JOSEPH,S/O.JOSEPH,
VATTAPPARA HOUSE,S.H.MOUNT.P.O,KOTTAYAM TALUK
AND DISTRICT,REP. BY THE POWER OF ATTORNEY HOLDER,
THOMAS VARGHESE,S/O.VARGHESE,THOTTUNKAL HOUSE,
KARIMKUNNAM.P.O AND KARA,THODUPUZHA TALUK,
IDUKKI DISTRICT.

BY ADV. SRI.A.V.THOMAS
SRI.MATHEW B. KURIAN
SRI.K.T.THOMAS
SRI.V.M.KURIAN

THIS CIVIL REVISION PETITION HAVING BEEN FINALLY HEARD ON 15/12/2006, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

ORDER ON I.A.NO. 269/06 IN CRP 61/06

DISMISSED

15/12/2006

SD/-M.SASIDHARAN NAMBIAR,JUDGE.

//True copy//

PA to Judge.

M.SASIDHARAN NAMBIAR,J.

C.R.P .NO. 61 OF 2006

Dated 15th December 2006

O R D E R

Petitioner is defendant and respondent the plaintiff in O.S.19/02 on the file of Munsiff court, Ettumanoor. Respondent filed I.A.1110/04, an application under Order XXIII Rule 1(3) of the Code of Civil Procedure for permission to withdraw the suit with liberty to file a fresh suit. As per order dated 7/9/2004 learned Munsiff allowed the application which is challenged in this revision petition.

2. Learned counsel appearing for petitioner and respondents were heard.

3. Learned counsel appearing for petitioner pointed out that petitioner has filed a detailed objection as to why permission cannot be granted as sought for as conditions provided under Sub Rule 3 of Rule 1 were not satisfied and respondent is not entitled to withdraw the suit with liberty to file fresh suit and in the impugned order learned Munsiff has not considered the objections at all and for the

reason alone the order is to be set aside. Learned counsel appearing for respondent argued that when petition was allowed, though reasons are not shown in the order it follows that there are sufficient reasons to allow the application and the ground that reasons were not shown in the impugned order, it cannot be set aside.

4. No plaintiff is entitled to withdraw the suit with liberty to file fresh suit as of right. Permission can be granted only on establishing the grounds provided under sub Rule 3 Apex court in **K.S.Bhoopathy and others v. Kokila and others (2000 (5) SCC 458)** laid down the principles as follows.

> 13. The provision in Order XXIII Rule 1 CPC is an exception to the common law principle of non-suit. Therefore on principle an application by a plaintiff under sub-rule (3) cannot be treated on a par with an application by him in exercise of the absolute liberty given to him under sub rule (1). In the former it is actually a prayer for concession from the court after satisfying the court regarding existence of the circumstances

justifying the grant of such concession. No doubt, the grant of leave envisaged in sub rule (3) of Rule 1 is at the discretion of the court but such discretion is to be exercised by the court with caution and circumspection. The legislative policy in the matter of exercise of discretion is clear from the provisions of sub rule (3) in which two alternatives are provided; first where the court is satisfied that a suit must fail by reason of some formal defect, and the other where the court is satisfied that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject matter of a suit or part of a claim. Clause (b) of sub rule (3) contains the mandate to the court that it must be satisfied about the sufficiency of the grounds for allowing the plaintiff to institute a fresh suit for the same claim or par of the claim on the same cause of action. The court is to discharge the duty mandated under the provision of the Code on taking into consideration all relevant aspects of the matter including the

> desirability of permitting the party to start a fresh round of litigation on the same cause of action.
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> It is the duty of the court to feel satisfied that there exist proper grounds/reasons for granting permission for withdrawal of the suit with leave to file fresh suit by the plaintiffs and in such a matter the statutory mandate is not complied with by merely stating that grant of permission will not prejudice the defendants."

Impugned order shows that learned Munsiff has not considered the existence of any of the grounds provided under sub rule 3 of Rule before granting permission. In fact the order does not show that any of the objections was considered by the learned Munsiff. Being a statutory mandate, a court is bound to consider and enter a finding as to why the permission is granted. The order is absolutely non speaking and is bad. Impugned order is therefore quashed. Learned Munsiff is directed to pass appropriate order in I.A.1110/04 in accordance with law in the light of decisions of the

Apex court. Learned counsel appearing for respondent submits that respondent has already filed a suit after withdrawal of the suit and it is listed for trial. Learned counsel appearing for petitioner also submits that order of stay of further proceedings in O.S.170/04 the subsequent suit granted by this court may be continued till disposal of the application by learned Munsiff. Order of stay was granted only to enable this court to decide the revision. Question whether O.S.170/04 is maintainable, without an order for leave granted by learned Munsiff, is a question to be considered by Munsiff while trying O.S.170/04 and there is no necessity to continue the order of stay. Learned Munsiff is directed to dispose of I.A.1110/04 expeditiously.

M.SASIDHARAN NAMBIAR,
JUDGE.

uj.